Goh Choon Lye v Alliance Bank (M) Bhd

HIGH COURT (PULAU PINANG) — BANKRUPTCY NO 29–4049 OF 2002
KAMALANATHAN RATNAM J
27 AUGUST 2003

Bankruptcy *— Notice — Final judgment — Judgment in default of defence — Application to set aside judgment in default dismissed by registrar and judge — Whether judgment a final judgment for issue of bankruptcy notice — Whether judgment a final judgment within the meaning of O 19 r 2(1) of the Rules of the High Court 1980 — Bankruptcy Act 1967 s 3(i), Rules of the High Court 1980 O 19 r 2(1)*

Judgment in default of defence was entered against the defendant on 16 August 2002. The application to set it aside was dismissed by the deputy registrar on 20 November 2002. The judge in chambers dismissed an appeal against this decision of the deputy registrar on 10 February 2003. Meanwhile, a bankruptcy notice was served on the defendant on 22 November 2002 and an application to set it aside was dismissed by the senior assistant registrar on 4 April 2003. The defendant appealed against the decision. Counsel for the defendant (appellant/judgment debtor) contended that the judgment upon which the bankruptcy notice was founded was not a final judgment as required under s 3(1)(i) of the Bankruptcy Act 1967. Counsel relied heavily on the case of *Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383. It was, inter alia, decided in *Udos* that for the purpose of bankruptcy proceedings, a default judgment is not final because it is not decided on the merits and could not be construed as a final judgment within the meaning of s 3(1)(i) of the Bankruptcy Act 1967.

Held, dismissing the appeal with costs:

The claim here was in respect of a liquidated sum and O 19 r 2(1) of the Rules of the High Court 1980 ('the RHC') clearly applied. The application to set aside the default judgment was dismissed both by the deputy registrar and the judge in chambers. There was thus clearly in the words of O 19 r 2(1) of the RHC a 'final judgment'. Although the defendant had appealed to the Court of Appeal, until such time the appeal is allowed the default judgment remained a final judgment upon which the plaintiff is entitled to execute. However, if the defendant succeeds at the Court of Appeal, the plaintiff could be subjected to a suit for malicious prosecution as happened in *Vijendran Ponniah v MBf Country Homes & Resorts Sdn Bhd* [2002] 1 MLJ 535 (see p 744F–H); *Udos ak Riging, ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383 and *Vijendran Ponniah v MBf Country Homes & Resorts Sdn Bhd* [2002] 1 MLJ 535 distinguished.

[Bahasa Malaysia summary

Penghakiman ingkar pembelaan telah dimasuki terhadap defendan pada 16 Ogos 2002. Permohonan untuk mnegenepikannya telah ditolak oleh timbalan pendaftar pada 20 November 2002. Hakim

dalam kamar telah menolak satu rayuan terhadap keputusan timbalan pendaftar pada 10 Februari 2003. Sementara itu, satu notis kebankrapan telah disampaikan ke atas defendan pada 22 November 2002 dan satu permohonan untuk mengenepikannya telah ditolak oleh penolong kanan pendaftar pada 4 April 2003. Defendan telah merayu terhadap keputusan tersebut. Peguam bagi pihak defendan (perayu/penghutang penghakiman) telah menegaskan bahawa penghakiman di mana notis kebankrapan tersebut diasaskan bukan satu penghakiman muktamad sebagaimana yang dikehendaki di bawah s 3(1)(i) Akta Kebankrapan 1967. Peguam telah bergantung kepada kes *Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383. Ia telah, antara lain, diputuskan dalam *Udos* bahawa bagi tujuan prosiding kebankrapan, satu penghakiman ingkar bukan satu penghakiman muktamad kerana ia tidak diputuskan atas merit dan tidak boleh membentuk satu penghakiman muktamad dalam maksud s 3(1)(i) Ak ta Kebankrapan 1967.

Diputuskan, menolak rayuan dengan kos:

Tuntutan di sini adalah berhubung sejumlah yang tak menentu dan A 19 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dengan jelas terpakai. Permohonan untuk mengenepikan penghakiman ingkar telah ditolak oleh timbalan pendaftar dan hakim dalam kamar. Adalah jelas daripada perkataan-perkataan A 19 k 2(1) KMT satu 'final judgment'. Walaupun defendan telah merayu ke Mahkamah Rayuan, sehingga satu masa rayuan itu dibenarkan, penghakiman ingkar tersebut kekal satu penghakiman muktamad di mana plaintif berhak untuk laksanakan. Namun begitu, jika defendan berjaya di Mahkamah Rayuan, plaintif akan tertakluk kepada satu guaman untuk pendakwaan berniat jahat sepertimana yang berlaku dalam *Vijendran Ponniah v MBf Country Homes & Resorts Sdn Bhd* [2002] 1 MLJ 535 (lihat ms 744F–H); *Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383 dan *Vijendran Ponniah v MBf Country Homes & Resorts Sdn Bhd* [2002] 1 MLJ 535 dibeza.]

Notes

For cases on final judgments, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2216–2218.

Cases referred to

Udos ak Riging, ex p Seabanc Kredit Sdn Bhd, Re [1994] 3 MLJ 383 (dist)

Vijendran Ponniah v MBf Country Homes & Resorts Sdn Bhd & Anor [2002] 1 MLJ 535 (dist)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)
Rules of the High Court 1980 O 19 r 2(1)
Subordinate Courts Rules 1980 O 28 r 6(1)(a)

K Balasundaram (Balasundaram & Co) for the judgment debtor/appellant. A

Naseema Jalaludheen (Cheong Wai Meng & Van Buerle) for the judgment creditor/respondent.

Kamalanathan Ratnam J: B

Facts

Judgment in default of defence was entered against the defendant on 16 August 2002. The application to set aside the judgment in default of defence was heard on 7 November 2002 and dismissed on 20 November 2002 by the learned deputy registrar. A bankruptcy notice was filed on 19 December 2002 and served on the judgment debtor on 22 November 2002. The appeal to the judge in chambers against the decision of the learned deputy registrar was heard and dismissed on 10 February 2003. The application to set aside the bankruptcy notice was heard on 28 February 2003 and dismissed by the learned senior assistant registrar on 4April 2003. This is the judgment debtor's appeal against the decision given on 4 April 2003. C D

Case of the appellant

Mr Balasundaram for the appellant contended that the judgment upon which the bankruptcy notice is founded, is not a 'final judgment' as is required to be, pursuant to s 3(1)(i) of the Bankruptcy Act 1967 which reads as follows: E

> A debtor commits an Act of bankruptcy in each of the following cases:
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of the bankruptcy notice or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained: F G H
>
> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order; I

A Counsel for the appellant relied heavily on *Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ 383 where Abdul Kadir Sulaiman J (as he then was) had held that for the purpose of bankruptcy proceedings, a default judgment is not final because it is not decided on the merits and since any judgment not given on merit is liable to be set aside on application because it had not finally disposed of the rights of the parties, such a B judgment could not be construed as a final judgment within the meaning of s 3(1)(i) of the Bankruptcy Act 1967. He further went on to hold that if the debtor had not appealed within time, the default judgment would have crystallized into a final judgment.

In *Vijendran Ponniah v MBf Country Homes & Resorts Sdn Bhd & Anor* C [2002] 1 MLJ 535, the plaintiff, an advocate and solicitor, sent his bills to the first defendant and its holding company for the facilities agreement and loan agreement prepared. Subsequently, on 29 March 1988, the first defendant sent a notice of demand to the plaintiff who was a holder of a credit card from the first defendant, claiming the sum due on the credit card. By a letter dated 6 April 1988, the plaintiff denied owing the sum to D the defendant. Instead, the plaintiff demanded payment on his bill which far exceeded the sum claimed by the first defendant. A summons was issued by the first defendant on 23 April 1988 but was never served on the plaintiff. The first defendant nevertheless proceeded to obtain judgment in default of appearance against the plaintiff on 28 June 1988. Four years later, on 1 E December 1992, the first defendant instructed the second defendant to commence bankruptcy proceedings against the plaintiff. Upon the publication of the creditor's petition against the Plaintiff in the newspaper, the Plaintiff applied to set aside the service of summons. On the preliminary issue that the summons was never served on the plaintiff, the learned magistrate set aside the service of the summons on 22 August 1995 and F struck out the creditor's petition. The plaintiff filed this action to claim for damages for civil malicious prosecution arising out of the bankruptcy proceedings and for abuse of court process. Although I followed the decision in *Re Udos ak Riging,* there is one big difference between the facts in *Vijendran Ponniah* and in the case before me. In the former, judgment was in default of appearance and the default judgment was never served on the G plaintiff thus giving him no opportunity to set it aside and that therefore the default judgment had not crystallized into a final judgment. In the case before me the judgment was in default of defence.

Findings of the court

H Order 19 r 2(1) of the Rules of the High Court 1980 ('the RHC') reads as follows:

> Where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for I service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

Since this claim is in respect of a liquidated sum, clearly O 19 r 2(1) applies. Where no defence is filed in respect of an unliquidated claim then O 19 r 3 applies whereby after the expiration of period fixed by or under the rules for service of the defence, the plaintiff may enter interlocutory judgment against the defendant for damages to be assessed, and for costs.

The words 'final judgment' in O 19 r 2(1) must have significance. There was no question as in *Vijendran Ponniah* that the default judgment was not served on the appellant. Although I had followed the decision in *Re Udos ak Riging,* I must hasten to add that in *Re Udos ak Riging*, the judgment in default was obtained pursuant to O 28 r 6(1)(a) of the Subordinate Courts Rules 1980 ('the SCR') which is reproduced herewith for ease of reference:

> If when an action, other than actions to which Orders 43, and 45 apply, is called on for hearing, the plaintiff appears but the defendant does not appear, the Court may:
>
> (a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim;

It is important to note that the said sub rule (a) does not state 'final judgment'. Order 28 r 8(1) of the SCR further provides that any judgment or order obtained where one party does not appear at the hearing, may be set aside by the court, on the application of that party, on such terms as it thinks just.

Having obtained such a judgment, and whilst the debtor had applied under sub r 8(1) to set the judgment aside and whilst parties were awaiting a hearing date for the application to set aside, the petitioner served a bankruptcy notice on the debtor.

The facts of the case before me are totally different. Here the application to set aside the default judgment was dismissed both by the learned deputy registrar and the judge in chambers. There is clearly in the words of O 19 r 2(1) of the RHC, 'a final judgment'. The defendant has argued that he has appealed to the Court of Appeal. That may well be so but until such time as that appeal is allowed this judgment remains a final judgment on which the plaintiff is at liberty to execute. Of course the plaintiff must be aware that if the defendant succeeds at the Court of Appeal, the plaintiff could be subjected to a suit for malicious prosecution as happened in *Vijendran Ponniah.* But then, such are the affairs of litigation, giving meaning to the saying 'as you sow, so shall you reap'.

I had no hesitation in dismissing the appeal with costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon